

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENDELL J. KARONKA, individually and §
on behalf of similarly situated individuals §
§
Plaintiff §
§
v. § CIVIL ACTION NO. 4:23-cv-02891
§
ASUKA BLUE INVESTMENT, LLC and §
YOSHITOMO, INC. d/b/a ATAMI STEAK §
AND SUSHI §
§
Defendants. §

DEFENDANT'S MOTION TO DISMISS

Defendant, Yoshitomo, Inc., files its Motion to Dismiss Plaintiff's Original Complaint ("Plaintiff's Complaint") pursuant to Fed. R. Civ. P. 12(b)(6), as follows:

I.
NATURE AND STAGE OF THE PROCEEDING

This is a purported collective action filed under the Fair Labor Standards Act ("FLSA").

The case was recently filed.

II.
STATEMENT OF THE ISSUES

The issue to be ruled on by the Court is whether Plaintiff has pleaded a cognizable claim against Defendant, or if it should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). On appeal, the court reviews a dismissal under Rule 12(b)(6) *de novo*. *Miller v. BAC Home Loan Servicing, L.P.*, 726 F.3d 717, 721 (5th Cir. 2013).

III.
ARGUMENT

Plaintiff Kendell Karonka worked at the Atami Steak and Sushi restaurant located in College Station, Texas. Plaintiff's Complaint at ¶ 16. Defendant does not own or operate this restaurant. *See* the Declaration of Yu Chen, attached as Exhibit "A," at ¶ 3. Rather, this restaurant is owned and operated by Defendant Asuka Blue Investment, LLC ("Asuka Blue"). *Id.* Plaintiff's paychecks were issued by Asuka Blue. *See, e.g.*, Exhibit "A-1." Asuka Blue had the exclusive ability to hire and fire employees at this restaurant, maintained all personnel records for employees at this restaurant, determined the rate and method of payment for employees at this restaurant, and supervised and controlled employee work schedules or conditions of employment. Exhibit "A" at ¶ 3.

Plaintiff never worked for Defendant during the relevant time period. *Id.* at ¶ 4. Defendant owns the Atami Steak and Sushi restaurant located in Katy, Texas. *Id.* Plaintiff never worked at this restaurant during the relevant time period. *Id.* As it pertains to the Atami Steak and Sushi restaurant located in College Station, Defendant did not have the ability to hire and fire employees at this restaurant, did not maintain personnel records for employees at this restaurant, did not determine the rate and method of payment for employees at this restaurant, and did not supervise or control employee work schedules or conditions of employment. *Id.*

In order to bring a viable claim under the FLSA, a plaintiff must sue his employer. *Gray v. Powers*, 673 F.3d 352, 354 (5th Cir. 2012) ("The FLSA requires 'employers' to pay their employees a minimum wage. 29 U.S.C. § 206(a)"). Someone who does not control any aspect of the employment relationship is not an employer. *Id.* at 357.

Asuka Blue was Plaintiff's employer and is properly before this Court. On the other hand, Defendant never employed Plaintiff. Accordingly, Plaintiff has failed to state a claim against Defendant, and it should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

WHEREFORE, Defendant Yoshitomo, Inc. respectfully requests that Plaintiff's claims against it be dismissed with prejudice, and that it be granted whatever further relief to which it shows itself to be justly entitled.

Respectfully submitted,

MARTIN, DISIERE, JEFFERSON & WISDOM, L.L.P.

/s/ James M. Cleary, Jr.

James M. Cleary, Jr.
State Bar No. 00783838
Federal ID No. 15499
cleary@mdjwlaw.com
808 Travis, Suite 1100
Houston, Texas 77002
Telephone: (713) 632-1700
Facsimile: (713) 222-0101
ATTORNEY IN CHARGE FOR ASUKA
BLUE INVESTMENT, LLC, AND
YOSHITOMO, INC. D/B/A ATAMI
STEAK AND SUSHI

OF COUNSEL:

MARTIN, DISIERE JEFFERSON & WISDOM, L.L.P.
808 Travis, Suite 1100
Houston, Texas 77002
Telephone: (713) 632-1700
Facsimile: (713) 222-0101

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above pleading has been forwarded via e-filing pursuant to Fed. R. Civ. P. 5, on this the 30th day of August, 2023 to:

Trang Q. Tran
TRAN LAW FIRM
2537 S. Gessner, Suite 104
Houston, Texas 77063

/s/ James M. Cleary, Jr.

James M. Cleary, Jr.